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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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Review of Commission Consider-Ation of Applications Under the Cable Landing License Act	)	IB Docket No. 00-106
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COMMENTS OF SPRINT

Sprint Communications Company L.P. ("Sprint") respectfully submits its comments in response to the Commission's June 22, 2000 Notice of Proposed Rulemaking, FCC 00-210 ("NPRM") in the above-captioned proceeding.

SUMMARY

The submarine cable business in changing quickly, driven primarily by increasing competition in the telecommunications industry worldwide. In an environment where international communications was almost exclusively the province of government owned monopolies, carriers were forced to cooperate for a hundred years to construct these important facilities. The structure that evolved to meet these needs was the submarine cable consortium.

Slow and bureaucratic, the consortium cable structure is not well suited to the current worldwide trend towards privatization and competition in the provision of

telecommunications, a trend that the 1997 WTO Agreement on Basic Telecommunications has only begun to accelerate. While consortium cables have tried to adapt, their future is uncertain.

Sprint is a large buyer of both private and consortium cable capacity; it does not inherently favor either type of system. Despite their disadvantages, Sprint feels that the Commission should do nothing to inhibit the ability of carriers to organize future consortium cables. Consortium cables may still prove a viable means for carriers to provide themselves with international capacity, and carriers should be able to maximize their choices in procuring such capacity. In particular, consortium cables are an important way of ensuring the competitiveness of third party submarine cable providers. For this reason, Sprint urges the Commission to tread carefully before taking steps that favor or hobble particular ways of supplying this necessary commodity.

Background. Sprint believes that the Commission's proposals for the streamlining of submarine cable license applications have been overtaken by the rapidly changing submarine cable market and are therefore unnecessary. Although it does not say so explicitly, as Sprint observes below, the NPRM unjustifiably appears aimed at "consortium" submarine cable systems constructed by multiple carriers for

their own use. Consortium systems are the way that international telecommunications carriers have provided themselves with necessary transmission capacity in the past. An understanding of the history of these systems is critical to understanding their place in the market today and to how whether and how these arrangements should be regulated.

For over a hundred years, international telecommunications carriers have constructed and operated submarine cables cooperatively under the so-called "consortium" model. Under this model, a few large international carriers, usually monopolists or, at best, incumbents, traditionally cooperated to consider, fund, construct, and operate submarine cable systems.

Until very recently, such cooperation was an absolute necessity. In the past, government owned monopoly telecommunications providers were the rule rather than the exception. They still exist in many countries. It was thus inconceivable that the British Post Office, for example, might build and operate a submarine cable to Germany without the full cooperation and involvement of the Deutsche Bundespost. Cooperation was thus the only way that international submarine cables could be built and operated.

Having cooperatively determined that a new submarine cable was necessary, these carriers would next sign a memorandum of understanding (MOU) among themselves

establishing the broad outlines of the proposed system including, for example, selecting the countries where the cable would land and the terminal or landing parties.

These "MOU parties" would then hold data gathering meetings to determine the extent of interest by other potential owners in the proposed cable and to see if the large sums necessary to construct the cable could be raised. The process was slow, but speed to market was not critical as demand grew at a measured pace and consumers had no alternative in any event.

Because carriers built cables to meet their collective projected needs, the idea of building a cable with substantial additional capacity beyond those needs was alien: as there was little or no competition, who would need or buy this additional capacity? Why should the owners expend capital to build unnecessary capacity that might never be used in a slowly growing market?

Once sufficient commitments existed to underwrite the expense of building the cable, the owners would sign a "construction and maintenance agreement" (C&MA).[1] They would also establish various committees and subcommittees to oversee the complex process of selecting a vendor,

[1] The essentially cooperative nature of the consortium undertaking is illustrated by the fact that while submarine cable systems are hugely expensive- a billion dollars is typical for a large modern cable system- the C&MA documents are remarkably brief given the sums involved.

overseeing construction of the cable, and ensuring that construction proceeded in a timely fashion.

The owners would also select a network administrator who would issue bills, receive payments, and keep track of the ownership interests in the cable system. Once the cable was almost ready for service, the owners would establish still other committees and subcommittees, such as an Activation, Routing and Restoration Committee, to ensure the smooth functioning of the system.

This cumbersome structure was necessitated by the fact that until very recently, the laying of submarine cables by definition required cooperation from monopoly carriers in two or more countries. It was also impractical, uneconomic, and in some cases impossible for each carrier to construct its own cable. The consortium structure also allowed the owners to know exactly how much the project would cost to build and operate, and gave the owners (particularly the terminal or landing parties) control over important matters such as restoration in the event of a cut or other failure.[2]

In short, consortium cables, based on a market structure requiring cooperation, were a concomitant of the monopoly era. The lengthy and bureaucratic decision-making, diffused and unfocused management, emphasis on operational

[2] In addition to the telephone industry's traditional concerns over quality of service, the failure of a submarine cable meant not only that a costly international facility was going unused, but that revenue

control and lack of competitive concerns[3] typical of consortium cables were well suited to that environment. The consortium structure, however, is ill suited to the increasingly competitive telecommunications environment that is developing worldwide. The 1997 WTO Agreement on Basic Telecommunications has only begun to accelerate the worldwide drive towards competition in telecommunications, and its influence will be felt for many years to come.

For its part, Sprint seeks the lowest cost, highest quality transmission facilities to serve its customers' needs. As demonstrated by its early participation in PTAT, the very first private transatlantic cable, and its significant investment in Atlantic Crossing 1, a recent private cable, Sprint is not wedded to any particular type of submarine cable. However, Sprint believes that increasingly powerful market forces will dictate the future organization of submarine cable systems much more quickly and effectively than regulation can.

As more and more countries transition to competition, Sprint believes the traditional consortium cable model must either change substantially to adapt to this new environment, adopting the types of pro-competitive features

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generating communications that might have gone over that facility would have to be blocked or rerouted over higher cost facilities (e.g. satellite).

[3] It bears emphasis that a lack of concern for competition is not the same as the intent to inhibit or damage competition: a transmission or network engineer who has designed submarine cable stations only in a

both Sprint and the Commission would like to see, or disappear. The status quo is not an option except in rare cases, such as a cable system that mainly connects countries where telecommunications is provided exclusively or mainly by private or government owned monopolists, an increasingly rare scenario.[4]

The traditional consortium cable structure is trying to adapt, often at the urging of owners like Sprint who operate in a competitive telecommunications market: newer consortium cables have multiple owners of multiple landing stations in each landing country, and provide for liberal rights of co-location and competitive backhaul. But those changes may not be enough, as demonstrated by Sprint's understanding that the only consortium cable system landing in the U.S. currently under active consideration is Americas-III.

Americas-III will face competition from Global Crossing's South America Crossing, from Tycom's SAM project and from the Atlantis-1 project as well. If Americas-III does not allow its prospective owners to achieve cost, flexibility and quality parameters equal to or better than those that will be offered by its private cable competitors, it will not be funded.

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monopoly environment for thirty years would likely consider multiple backhaul providers unnecessary, inefficient and wasteful.

[4] The Commission would be unlikely to have landing license authority in this event anyway.

The cloudy future for consortium cables is further demonstrated by the fact that most recent submarine cable activity is by new entrants, oftentimes public companies like Global Crossing or Tycom. These entrants do not provide service to end users, have access to capital markets and substantial expertise in the business, and aggressively seek to displace traditional consortium cable systems.[5]

Streamlining Proposals. Against this backdrop, the Commission's elaborate streamlining proposals are a complicated solution in search of a problem. If enacted, the proposals would complicate the lives of potential submarine cable applicants, especially consortium applicants. This in turn will make the consortium structure less attractive and limit the ability of international carriers to obtain facilities rapidly at favorable prices.

The Commission should also not forget that as countries open themselves to competition, it is increasingly feasible to land important cables in locations where it is easy to do business and use terrestrial transit or smaller cables to reach the U.S. If it is too difficult for consortium cables to land in the U.S. because of regulatory delays and

[5] This is particularly the case with Tycom, which is one of only three major submarine cable contractors in the world with the capability to design, manufacture, and lay an entire submarine cable system. Tycom was formed from AT&T Submarine Systems, which was purchased from AT&T by Tyco International, Tycom's parent. According to its SEC registration documents, Tycom will offer connectivity between the thirty most important cities in the world. See Tycom SEC Form S-1, Amendment No. 6, July 26, 2000 at 38. It is therefore not only an important potential supplier of future submarine cable systems, but also a substantial competitor.

hurdles, this will deprive U.S. carriers like Sprint of the opportunity to be terminal or landing or MOU parties. It will also deny the Commission important regulatory authority over submarine cable systems that it might otherwise have had.

The Commission's various proposed tests to qualify for streamlining are also hard to define and enforce. For example, the Commission proposes that if there are at least three independently controlled cables on a "route," the cable would qualify for streamlined processing. The NPRM suggests that where cable systems have multiple landing points, the applicants would have to demonstrate that there are other economically comparable means to access each point[6] that would be served by the cable.

Sprint believes this requirement could have the perverse effect of inhibiting rather than increasing competition. Assume, for example, that a new cable system would serve ten countries that are already served by multiple cable systems and an eleventh country that would receive direct service via submarine cable for the first time instead of having to rely solely on costly INTELSAT facilities. Assume further that the applicant could not

[6] It is not clear whether the Commission means by the term "point." Although the NPRM at para. 26 refers to a landing point in a foreign country, it is not clear whether, to qualify for streamlined processing the relevant cables must all land at the same cable station, within an unspecified distance from existing cable stations, or anywhere within the same country. The competitive implications for each of these three examples may be quite different.

demonstrate that there were other economically comparable means of serving the new point.

Because one point out of eleven could not make the required showing, the benefits of additional competition to the other ten points would be delayed. Moreover, the introduction at the eleventh point of intermodal competition between satellite and cable technologies, which the Commission has previously found in the public interest,[7] and the cost reductions made possible by the new cable would be delayed as well. Alternatively, as the NPRM at para. 31 recognizes, the applicants might simply exclude the twelfth point from the cable system.

Even if the Commission determined that a proposed cable system did not qualify for streamlined processing because of perceived competitive problems on the foreign end, it is unclear what a more leisurely examination of the application would accomplish. Assume, for example, that an applicant proposed a new submarine cable between the U.S. and India. Assume further that the cable's owner applicants were several U.S. carriers and Videsh Sanchar Nigam Limited (VSNL).

VSNL has a legal monopoly over international telecommunications to and from India until 2004. As such, it has exclusive control over all submarine cable landing

[7] *See, e.g.,* Application for TPC-4 , 4 FCC Rcd 8042 (1989).

stations in India as well as control over backhaul. India is also a WTO member country. Would the Commission deny or delay a landing license for this hypothetical cable because of VSNL's legal monopoly over cable stations in India? Would the Commission attempt to use its control over the U.S. landing license to leverage VSNL into giving up rights to which it is legally entitled? In Sprint's view, the latter course is so difficult as to be self-defeating and risks damaging relations between two sovereign governments in the bargain.[8]

Similarly problematic is the Commission's second proposed test that a cable system be controlled predominately by new entrants to qualify for streamlined processing. Leaving aside the complicated attribution process[9] necessary to identify members of the "key applicant group," the NPRM implicitly assumes that owners or members of the key applicant group would stand idly by and permit

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[8] *See* Spiwak, "Why Cable Could be the Next WTO Battleground," Communications Week International, 16 August 1999: "this case shows that the growing "telecoms trade war" between the U.S. and the world is dangerously close to getting out of hand."

[9] Para. 36 of the NPRM posits that it would be a simple matter to identify all the members of the key applicant group, calculate their share of existing capacity on the route. It would not, however, be simple. Presumably the applicants should exclude IRUs that they have sold and include IRUs they have purchased on the route in question. They would thus have to track and tally all relevant IRU transactions by every member of the key applicant group to ascertain whether they qualified for sreamlined treatment. Moreover, modern cable systems allocate capacity in terms of MIU points which are applied towards the purchase of capacity on one or more segments of a multi-segment cable. Since the actual amount of capacity each owner has on a particular segment will not become clear until it has "spent" all its MIU points, it will be difficult or impossible to calculate how much capacity the key applicant group controls on particular routes. For these and other reasons, Sprint disagrees with the NPRM's assessment at para. 118 that qualifying for streamlined processing would not impose a significant burden on the applicant.

cable station owners, for example, to act anticompetitively to the disadvantage of other owners on the same system.

Sprint owns one of the two U.S. landing stations on the upcoming TAT-14 cable. As such, this would, under the proposal in n. 62 of the NPRM, have prevented TAT-14 from qualifying for streamlined processing. But it does not follow that Sprint's incentives are any different from a new entrant not a member of the "key applicant group" just because it happens to own a landing station.

Sprint has no interest in being overcharged for backhaul or otherwise exploited, and has campaigned vigorously for rights to co-location in all cable stations and for access to competitive backhaul. It could hardly attempt to exploit its ownership of a TAT-14 cable station to extract monopoly rents while calling for co-location and competitive backhaul on other cable systems where it is an owner. As the owner of only one cable station, but an owner on many cable systems, Sprint has much more to lose than to gain if cable station owners were free to behave anticompetitively.

Given both increasing competition and attempts by most cable station owners to become global telecommunications players, Sprint also believes that even former and soon-to-be former monopolists will come to the same view (if they have not done so already): no single entity controls all

cable stations, and an impregnable monopolist in country A attempting to extend its reach to country B where it has no previous presence may find that the same, seemingly reasonable, practices it had adopted in A are intolerable in B.

Sprint also specifically opposes Global Crossing's proposal that the Commission require that the landing parties on the U.S. end of a cable not have a combined share of more than 35 percent of the active half circuits on the U.S. side of the route served by the cable. Global Crossing's so-called "structural solution" is no more than a formula to divide the submarine cable market between private submarine cables and traditional consortium systems. As such, it would deprive carriers of the option to self-supply, an important control on the ability of third party providers to overcharge.

The final proposed streamlining option is the demonstration of sufficient pro-competitive arrangements. In particular, the Commission would look, among other things, to the existence of sufficient co-location rights, competitive backhaul, and to the ability to upgrade cable capacity by a 51 percent vote of the owners or by any owner(s) willing to fund the cost of the upgrade. NPRM at para. 47.

As to co-location rights and competitive backhaul, Sprint supports such rights for proposed submarine cable systems that land in the U.S. But para. 42 of the NPRM also proposes that these rights be available not only in the U.S. but also in foreign landing stations as a prerequisite for streamlining. The Commission's jurisdiction does not extend to other countries. An attempt to use the U.S. landing license process to influence behavior in other countries might well be perceived as unwarranted interference in the affairs of another sovereign nation. It might also constitute a violation of U.S. WTO commitments. And, most of all, it is likely, as previously explained, to be either ineffective or result in lack of additional service to countries with little or no cable service at present.

The troublesome lack of parallel treatment of consortium and private submarine cables in this proceeding is illustrated by the Commission's proposal to accord streamlined treatment to those applicants offering co-location rights and competitive backhaul. Because modern private cable systems typically offer city-to-city pricing, co-location and backhaul are usually irrelevant. This lack of parallel treatment

[10] That this proceeding is clearly aimed at consortium cable systems is demonstrated by the fact that new private cable systems do not generally permit co-location and competitive backhaul for they offer service on a city to city basis. Ironically, a private cable system might therefore not qualify for streamlined processing under this proposed steamlining option.

is also illustrated by the Commission's proposal that the price of streamlining is acceptance of restrictions on the owners' ability to negotiate freely the terms of such upgrades. Private submarine cable systems typically do not offer expansion or bonus capacity to their customers. In a consortium cable system, the terms and conditions for upgrades are negotiated by the owners, large and small.

Recall that on consortium cable systems, the MOU parties need the investment of others to help defray the cost of the system.[11] If there are insufficient commitments to fund the system, the owners must either fund capacity they do not need in the hopes that it can be sold in the future and their investment recovered, or not build the system. The availability of expansion capacity at potentially attractive prices[12] is one benefit that can be offered to possible owners.

The threshold for consortium cable expansion is currently the result of a balancing of the interests of large and small owners. It is not technically feasible to expand a cable in small increments, so when expansion occurs, all owners receive their share of the expansion capacity whether they need it or not and must pay their

[11] The Japan-US consortium, for example, employed salespeople and actively marketed to potential owners.

[12] There is, of course, no guarantee that such expansion capacity will prove an attractive investment in two or three years because the relentless march of technology and declining unit costs usually make the newest cable system the cheapest on a unit basis.

proportional share of the costs. This means that larger owners bear most of the cost.

Smaller owners who are new entrants typically grow faster than larger owners and thus need to expand their capacity sooner. Because their ownership interest is small, doubling their capacity does not cost a substantial amount in absolute terms. By contrast, larger owners, whose needs are not expanding as quickly, may not require extra capacity as quickly as smaller owners.

Under the Commission's 51% expansion proposal, the smaller owners can collectively impose substantial unnecessary costs on the larger owners.[13] To the extent that large and small owners compete, the Commission's rules unfairly hobble the former. Sprint believes that the current process for determining expansion thresholds is the product of free bargaining among parties with roughly equal bargaining power. Inasmuch as it reasonably balances the interests of large and small owners, Sprint believes it is superior to the Commission's proposed threshold.[14]

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[13] The cost of expanding a modern cable system is substantial. A recent proposed expansion on a modern cable system of which Sprint is aware would have cost $500 million, although this did include laying of an additional segment in addition to electronics upgrades.

[14] Sprint does not oppose the Commission's proposal that streamlined processing be available to any cable system permitting expansion by any group of owners willing to pay for the upgrade. This proposal does not have the disadvantage of effectively permitting the imposition of costs on unwilling owners at some arbitrary prescribed regulatory threshold. Sprint also supports as a policy matter the NPRM's proposal that there be no restrictions on resale or transfer of capacity. Sprint notes, however, that many foreign owners desire restrictions on the transfer of capacity so that the common reserve, if one exists, is sold out before the owners can sell or transfer their own capacity. These carriers are risk averse and want to recover their initial investment as quickly as possible. Sale only from the common reserve ensures that all owners share in the proceeds from the sale of capacity on the system, enabling the risk averse owners to recover their

Notwithstanding Sprint's reservations about the Commission's streamlining proposals, Sprint believes there is an important role for the Commission in submarine cable matters. But this role should be carefully tailored and applied on a case-by-case basis. Sprint has previously pointed out to the Commission that certain aspects of submarine cable systems, such as the operation of DCX cross-connections, possess monopoly characteristics.[15]

When those responsible for these functions fail to exercise their responsibilities, the impact on cost and quality of service as well as competition are immediate and real. In these instances, the Commission's oversight and potential for intervention can serve the public interest. Sprint believes that scarce Commission resources are most appropriately reserved for these occasions.

Specific Streamlining Methods. The Commission proposes that a submarine cable landing license application that qualifies for streamlined processing would in ordinary circumstances be granted by public notice within sixty days after public notice of the application. Sprint supports this proposal. Unfortunately, if the Commission adopts its proposed threshold requirements for streamlined processing,

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investment more quickly. While Sprint strongly supports resale and sharing, it fears that insistence on this practice may deter some foreign carriers from participating on cables that land in the U.S. or to exclude U.S. carriers as MOU parties.

[15] *See, e.g.*, letter from MCI Communications Corporation and Sprint Communications Co. L.P. to Chief, International Bureau, December 4, 1996.

the time it will take consortium cable applicants to gather the data necessary to qualify for streamlining means that delays will simply be incurred at the front end prior to filing. Overall, the Commission's proposals are unlikely to speed the grant of landing licenses to consortium cables even if they qualify for streamlined processing.

It perhaps bears emphasis that Sprint does not inherently favor either private or consortium cables, but wants the flexibility to obtain necessary capacity either from private cable entrepreneurs or by participating in consortium cables. As they currently stand, the Commission's proposals will likely favor private cables for no good reason.

The Commission should instead attempt - by streamlining or otherwise - to grant all landing license applications as quickly as possible. It is difficult to conceive of a situation where additional capacity would present competitive or other public interest concerns. In the Foreign Participation Order,[16] the Commission adopted a strong presumption that even where a landing license applicant was a carrier affiliated with a foreign carrier possessing market power in a WTO member country where the

[16] 12 FCC Rcd 23891 (1997), *recon. pending.*

cable landed, a strong presumption existed in favor of granting the application.[17]

Sprint believes that this simple and salutary policy should continue to be followed. If for some reason a particular application poses unique issues, the Commission has ample authority to remove that application from streamlined processing and deal with it separately, just as it does with Section 214 applications.

Codification of Routine Conditions. Sprint supports the codification of routine conditions on cable landing licenses in a rule. It also supports cable landing licenses automatically becoming effective within 30 days after grant unless the applicant informs the Commission otherwise. Sprint is unaware of any case where the applicants have disputed any of the conditions routinely imposed on landing licenses by the Commission, or where the applicant has refused the license as granted.

Level III proposes nondiscrimination requirements for submarine cables include carriers who are "major suppliers" regardless of whether they are U.S.-licensed. While attractive in theory, Level III would apparently have the Commission hold the U.S. landing license hostage to desired behavioral changes in other countries. For reasons already

[17] In cables involving applicants from non-WTO countries, the Commission would continue its effective competitive opportunities policy, essentially a reciprocity test. Sprint notes that this raises the difficult

explained, Sprint regards such interference as unworkable and of questionable legality.

Who Should be An Applicant. The NPRM proposes that an entity should be included as an applicant for a landing license if the entity is a landing station owner or (1) the entity has a five percent or greater voting ownership interest (except if ownership is exclusively at foreign points) and (2) the entity will use the U.S. points of the cable system in any capacity except for transit through the U.S.

Sprint agrees that U.S. landing license applicants should include entities who are landing station owners provided that the Commission meant to limit such inclusion to owners of U.S. landing stations. Sprint does not believe that the Congress intended to require owners of foreign cable stations to submit to U.S. licensing; the Act has never been interpreted in this manner in its 79 years of existence and there is no evidence in the legislative history that Congress intended such a result.

As for the proposal requiring inclusion as an applicant 5% or greater owners of capacity who will use the U.S. points of the cable system, Sprint continues to believe that the most appropriate reading of the statute is that the U.S. landing parties should be the applicants for the cable. The

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issue of how to treat an application for a submarine cable system that landed primarily, but not exclusively,

landing parties take the cable from the beach joint to the cable station on dry land. They operate the electrical equipment that powers and lights the cable system as well as the multiplexers and cross-connects that allow a cable to function. In short, they both land and operate the cable.

The Commission justifies its proposal by assuming that 5% or greater owners would have "significant ability to affect the operation of a cable system." But the statute says those who land or operate submarine cables must be licensed, not those who have significant ability to affect those who operate.

Also questionable is the proposed test that 5% owners who use the U.S. points of the cable system in any capacity (except for transit) must be submarine cable applicants. Internet service providers (ISPs) are rapidly becoming significant owners of capacity on submarine cables. Traditional telecommunications carriers also provide enhanced services over submarine cable circuits free of FCC regulation. The Commission has traditionally not regulated enhanced services or enhanced service providers; would it now require that ISPs and enhanced service providers be licensed? If so, a rulemaking proceeding on submarine cables would be an odd place to enact such a serious shift in Commission policy

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in WTO member countries.

CONCLUSION

The Commission has made a number of proposals to impose more structure on the way that it regulates the way issuance of submarine cable landing licenses. Sprint believes that most of these proposals would, if enacted, do more harm than good. The competitive market is already changing the traditional submarine cable business and circumstances have largely overtaken the Commission's proposals. Moreover, many of those proposals are of questionable legality and workability.

Finally, Sprint fears that regulations that effectively favor certain organizational structures for the landing and operation of submarine cables will lead to less competition, less choice, and higher costs rather than the opposite. For this reason, Sprint urges the Commission to consider carefully before promulgating rules that may well be unnecessary and harmful to competition.

Respectfully submitted,

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